

2961

No. 15025

United States
Court of Appeals
for the Ninth Circuit

HAROLD WENER, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent,
and
MOLLY WENER, Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court of the
United States

FILED

MAY -7 1956

PAUL P. O'BRIEN, CLERK

No. 15025

United States
Court of Appeals
for the Ninth Circuit

HAROLD WENER, Petitioner,
 vs.
COMMISSIONER OF INTERNAL REVENUE,
 Respondent,
 and
MOLLY WENER, Petitioner,
 vs.
COMMISSIONER OF INTERNAL REVENUE,
 Respondent.

Transcript of Record

Petitions to Review Decisions of The Tax Court of the
United States

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answers to Petitions for Redetermination of Deficiency:	
Docket No. 39559	11
Docket No. 39560	21
Appearances	1
Certificate of Clerk to Transcript of Record....	57
Decisions:	
Docket No. 39559	48
Docket No. 39560	49
Exhibits (Attached to Stipulation of Facts):	
3—Dissolution Agreement of Limited Partner- ship of Boreva Sportswear Co.....	22
5—Bill of Sale dated Feb. 1, 1947.....	27
6—Mutual Release dated Aug. 25, 1947.....	35
Findings of Fact and Opinion (Docket Nos. 39559-60)	40
Petition for Redetermination of Deficiency (39559)	3
Exhibit A—Notice of Deficiency.....	7

Petition for Redetermination of Deficiency	
(39560)	12
Exhibit A—Notice of Deficiency.....	17
Petitions for Review:	
Docket No. 39559	49
Docket No. 39560	51
Statement of Oral Testimony of Harold Wener	53
Statement of Points to be Relied Upon.....	56

APPEARANCES

For Petitioner:

STEPHEN S. GALLAGHER, Esq.

JOHN MOORE ROBINSON, Esq.

MARVIN GOODSON, Esq.

ROBERT M. HIMROD, Esq.

FRANKLIN K. LANE, III, Esq.

For Respondent:

JOHN J. BURKE, Esq.

The Tax Court of the United States

Docket No. 39559

HAROLD WENER, Petitioner,
 vs.

COMMISSIONER OF INTERNAL REVENUE,
 Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency as set forth by the Commissioner of Internal Revenue in his notice of deficiency (bearing symbols LA:IT:90D:CTF) dated December 21, 1951, and as a basis for his proceedings, alleges as follows:

1. The petitioner is an individual whose address for mailing in this proceeding is 1030 Bank of America Building, 650 South Spring Street, Los Angeles 14, California. Petitioner's return for the year here involved was filed with the Collector of Internal Revenue for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to petitioner on December 21, 1951.

3. The taxes in controversy are income taxes for the calendar year ending December 31, 1947 in the total deficiency amount of \$5,279.53.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The respondent erred in his determination that the loss in the amount of \$15,456.36, suffered by the petitioner in the calendar year 1947, was a loss from the sale of petitioner's partnership interest in Boreva Sportswear Co., a partnership.

(b) The respondent erred in increasing petitioner's share of partnership income from said partnership in the amount of \$15,456.36, in the calendar year 1947.

(c) The respondent erred in his determination that the petitioner had a capital loss in the calendar year 1947 in the sum of \$15,456.36.

(d) The respondent erred in his determination that petitioner's loss of \$15,456.36 in the calendar year 1947, should not be allowed as either.

(1) a loss incurred in a trade or business, or

(2) a loss incurred in a transaction entered into for profit though not connected with the trade or business.

5. The facts upon which petitioner relies as a basis for this proceeding are as follows:

During 1946 and for some time prior thereto, taxpayer and his wife were partnership members of the partnership doing business as Boreva Sportswear Co. in Illinois and Wisconsin. During 1946 a dispute arose between the taxpayer and his wife on one side, and the other partners on the other side. A dissolution agreement was entered into on September 6, 1946 that dissolved the partnership as of

January 31, 1947. Taxpayer and his wife moved to California in December 1946, where they entered into another sportswear manufacturing business known as Westminster Sportswear Manufacturing Co.

Said dissolution agreement provided the sums to be paid taxpayer and his wife for their partnership interest were to be computed as of the book value of the partnership and the partners' capital account as of January 31, 1947, plus the additional sum of \$13,768.50 to be paid taxpayer.

Such dissolution agreement also provided the terms of payment of said moneys after January 31, 1947.

The taxpayer's balance of capital account in Boreva Sportswear as of January 31, 1947, was \$49,924.63, and that of his wife was \$25,206.49. In accordance with the dissolution agreement and a so-called indemnity agreement collateral thereto, the remaining partners of Boreva Sportswear contracted to pay the taxpayer and his wife said amount less \$1,177.56 to indemnify for contingencies. The completed transaction took place on January 31, 1947 as follows:

Sale of partnership interest for.....	\$49,142.14
Cost of interest equivalent to capital ac-	
count January 31, 1947	49,924.63
	<hr/>
Capital loss from sale of interest.....	\$ 782.49

Taxpayer gave a Bill of Sale on February 1, 1947, covering all partnership assets.

The sale of partnership interests was duly reported as a long-term capital loss for 1947, 50% of which, or \$391.25, was taken into account.

Under the contract, the taxpayer received \$10,428.28 in April 1947, which left a balance of \$38,713.86. This balance was to be paid in installments with interest at 4%, from January 31, 1947, on January 31, 1948, April 15, 1948 and April 15, 1950.

Due to severe economic hardship and business losses, the Westminster Sportswear Co. which taxpayer and his wife had started in California in December 1946 and January 1947, was in such great need of additional financing, that taxpayer and his wife faced complete insolvency which condition reached a critical stage in July and August 1947.

On August 25, 1947, in order to obtain moneys with which to carry on the Westminster Sportswear Manufacturing Co., taxpayer and his wife settled the total outstanding balance due them of \$58,268.13 for the total sum of \$35,000.00 cash. Taxpayer's share was \$23,257.50 and his wife's share \$11,742.50. At that time, taxpayer and his wife executed a mutual release with the debtors. The release resulted in a loss to the taxpayer:

Balance to be received on contract.....	\$38,713.86
Cash accepted for immediate payment...	23,257.50
	<hr/>
Loss from transaction	\$15,456.36

This transaction was entirely separate and apart from the sale of the partnership interest which had been agreed to in September 1946 and was moti-

vated on the part of the taxpayer and his wife by the urgent need of funds at that time.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in income tax due from the petitioner for the year 1947; and for such other and further relief as the Court may deem meet and proper in the premises.

Respectfully submitted,

/s/ STEPHEN S. GALLAGHER,

/s/ JOHN MOORE ROBINSON,

/s/ MARVIN GOODSON,

Counsel for Petitioner

Duly Verified.

EXHIBIT A

Treasury Department, Internal Revenue Service,
417 South Hill Street, Los Angeles 13, Calif.

Office of Internal Agent in Charge, Los Angeles
Division—LA:IT:90D:CTF.

Mr. Harold Wener
1201 South Van Ness Avenue
Santa Ana, California

Dec. 21, 1951

Dear Mr. Wener:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1947 discloses a deficiency of \$5,279.53, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:CONF. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner,

/s/ By GEORGE D. MARTIN,
Internal Revenue Agent in Charge

CTF:vmc—Enclosures: Statement, Form of Waiver
GPO 16-32058-5

Statement
 Tax Liability for the Taxable Year Ended
 December 31, 1947

	Deficiency
Income tax	\$5,279.53

In making this determination of your income tax liability careful consideration has been given to the report of examination dated December 20, 1950, to your protest dated February 23, 1951, and to the statements made at the conferences held.

A copy of this letter and statement has been mailed to your representative, Mr. Gilbert G. Platt, 719 North Main Street, Santa Ana, California, in accordance with the authorization contained in the power of attorney executed by you.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return.....		\$ 6,197.87
Additional income:		
(a) Partnership income increased		15,456.36
Total		\$ 21,654.23
Additional deductions:		
(b) Capital loss from sale of partnership interest allowed		\$1,349.63
(c) Contributions increased	344.51	1,694.14
Net income adjusted		\$ 19,960.09

EXPLANATION OF ADJUSTMENTS

(a) In your income tax return for the year 1947 you reported loss in the amount of \$15,456.36 resulting from the sale of your interest in the partnership, Boreva Sportswear Co., as an ordinary loss deductible in full from your share of the distributable net

income of that partnership for its fiscal year ended January 31, 1947. It is determined that this loss from the sale of your partnership interest constituted a capital loss.

Therefore, your partnership income is increased in the amount of \$15,456.36, and appropriate adjustment is made in item (b) for allowance of the loss as a capital loss.

(b) You are allowed a capital loss of \$15,456.36, as explained in adjustment (a) above, 50 per cent of which, or \$7,728.18, is taken into consideration as a long-term capital loss. The adjustment to your income is computed as follows:

Net gain from sale or exchange of capital assets as reported in your return	\$ 349.63
Long-term capital loss from sale of partnership interest allowed	7,728.18
	<hr/>
Net capital loss determined	\$ 7,378.55
Net capital loss deductible in your 1947 return limited under section 117(d) (2) I.R.C.	\$ 1,000.00*
Net capital gain reported	349.63
	<hr/>
Adjustment	\$ 1,349.63

* The balance represents a capital loss carry-over under section 117(e), I.R.C.

(c) You are allowed a deduction for contributions in the amount of \$1,789.44 in lieu of \$1,444.93 claimed in your return, an increase of \$344.51.

COMPUTATION OF TAX

Net income adjusted	\$ 19,960.09
Less: Exemptions	1,000.00
	<hr/>
Balance, subject to surtax and normal tax.....	\$ 18,960.09
Tentative surtax	\$6,140.05
Tentative normal tax at 3%.....	568.80
	<hr/>
Total tentative tax	\$6,708.85
Less 5%	335.44
	<hr/>
Correct income tax liability	\$ 6,373.41

Income tax liability shown on return, account No. 3056579	1,093.88
Deficiency of income tax	\$ 5,279.53

[Endorsed]: T.C.U.S. Filed March 19, 1952.

[Title of Tax Court and Cause No. 39559.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Mason B. Leming, Acting Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. (a) to (d) inclusive. Denies the allegations of error contained in subparagraphs (a) to (d) inclusive of paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition, and all unnumbered subparagraphs thereof.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ MASON B. LEMING REM
Acting Chief Counsel, Bureau of
Internal Revenue

Of Counsel:

B. H. Neblett, District Counsel.

R. E. Maiden, Jr., Clayton J. Burrell, Special
Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed April 30, 1952.

The Tax Court of the United States

Docket No. 39560

MRS. MOLLY WENER, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency as set forth by the Commissioner of Internal Revenue in his notice of deficiency (bearing symbols LA:IT:90D:CTF) dated December 21, 1951, and as a basis for her proceedings, alleges as follows:

1. The petitioner is an individual whose address for mailing in this proceeding is 1030 Bank of America Building, 650 South Spring Street, Los Angeles 14, California. Petitioner's return for the year here involved was filed with the Collector of

Internal Revenue for the Sixth District of California.

2. The notice of deficiency (a copy of which is attached hereto and marked Exhibit A) was mailed to petitioner on December 21, 1951.

3. The taxes in controversy are income taxes for the calendar year ending December 31, 1947 in the total deficiency amount of \$283.07.

4. The determination of tax set forth in said notice of deficiency is based upon the following errors:

(a) The respondent erred in his determination that the loss in the amount of \$7,803.77 suffered by the petitioner in the calendar year 1947, was a loss from the sale of petitioner's partnership interest in Boreva Sportswear Co., a partnership.

(b) The respondent erred in increasing petitioner's share of partnership income from said partnership in the amount of \$7,803.77, in the calendar year 1947.

(c) The respondent erred in his determination that the petitioner had a capital loss in the calendar year 1947 in the sum of \$7,803.77.

(d) The respondent erred in his determination that petitioner's loss of \$7,803.77 in the calendar year 1947, should not be allowed as either

(1) a loss incurred in a trade or business, or

(2) a loss incurred in a transaction entered into for profit though not connected with the trade or business.

5. The facts upon which petitioner relies as a basis for this proceeding are as follows:

During 1946 and for some time prior thereto, taxpayer and her husband were partnership members of the partnership doing business as Boreva Sportswear Co. in Illinois and Wisconsin. During 1946 a dispute arose between the taxpayer and her husband on one side, and the other partners on the other side. A dissolution agreement was entered into on September 6, 1946 that dissolved the partnership as of January 31, 1947. Taxpayer and her husband moved to California in December 1946, where they entered into another sportswear manufacturing business known as Westminster Sportswear Manufacturing Co.

Said dissolution agreement provided the sums to be paid taxpayer and her husband for their partnership interest were to be computed as of the book value of the partnership and the partners' capital account as of January 31, 1947, plus the additional sum of \$13,768.50 to be paid taxpayer's husband.

Such dissolution agreement also provided the terms of payment of said moneys after January 31, 1947.

The taxpayer's balance of capital account in Boreva Sportswear as of January 31, 1947, was \$25,206.49, and that of her husband was \$49,924.63. In accordance with the dissolution agreement and a so-called indemnity agreement collateral thereto, the remaining partners of Boreva Sportswear con-

tracted to pay the taxpayer and her husband said amount less \$1,177.56 to indemnify for contingencies. The completed transaction took place on January 31, 1947, as follows:

Sale of partnership interest for.....	\$24,811.42
Cost of interest equivalent to capital account January 31, 1947	25,206.49
	<hr/>
Capital loss from sale of interest.....	\$ 395.07

Taxpayer gave a Bill of Sale on February 1, 1947, covering all partnership assets.

The sale of partnership interests was duly reported as a long-term capital loss for 1947, 50% of which, or \$197.53, was taken into account.

Under the contract, the taxpayer received \$5,-265.15 in April 1947, which left a balance of \$19,-546.27. This balance was to be paid in installments with interest at 4%, from January 31, 1947, on January 31, 1948, April 15, 1948 and April 15, 1950.

Due to severe economic hardship and business losses, the Westminster Sportswear Co. which taxpayer and her husband had started in California in December 1946 and January 1947, was in such great need of additional financing, that taxpayer and her husband faced complete insolvency which condition reached a critical stage in July and August 1947.

On August 25, 1947, in order to obtain moneys with which to carry on the Westminster Sportswear Manufacturing Co., taxpayer and her husband set-

tled the total outstanding balance due them of \$58,268.13 for the total sum of \$35,000.00 cash. Taxpayer's share was \$11,742.50 and her husband's share \$23,257.50. At that time, taxpayer and her husband executed a mutual release with the debtors. The release resulted in a loss to the taxpayer:

Balance to be received on contract.....	\$19,546.27
Cash accepted for immediate payment... ..	11,742.50
	<hr/>
Loss from transaction	\$ 7,803.77

This transaction was entirely separate and apart from the sale of the partnership interest which had been agreed to in September 1946 and was motivated on the part of the taxpayer and her husband by the urgent need of funds at that time.

Wherefore, petitioner prays that this Court may hear this proceeding and determine that there is no deficiency in income tax due from the petitioner for the year 1947; and for such other and further relief as the Court may deem meet and proper in the premises.

Respectfully submitted,

/s/ STEPHEN S. GALLAGHER,

/s/ JOHN MOORE ROBINSON,

/s/ MARVIN GOODSON,

Counsel for Petitioner

Duly Verified.

EXHIBIT A

Treasury Department, Internal Revenue Service,
417 South Hill Street, Los Angeles 13, Calif.

Office of Internal Revenue Agent in Charge, Los
Angeles Division—LA:IT:90D:CTF.

Mrs. Molly Wener
1201 South Van Ness Avenue
Santa Ana, California

Dec. 21, 1951

Dear Mrs. Wener:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1947 discloses a deficiency of \$238.59, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency or deficiencies mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency or deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Los Angeles, California, for the attention of LA:CONF. The signing and filing of this form will expedite the closing of your return by permitting an early as-

assessment of the deficiency or deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,

JOHN B. DUNLAP,
Commissioner

/s/ By GEORGE D. MARTIN,
Internal Revenue Agent in Charge

CTF:vmc—Enclosures: Statement, Form of waiver.
GPO 16-23058-5

Statement

Tax Liability for the Taxable Year Ended
December 31, 1947

	Deficiency
Income tax	\$ 238.59

In making this determination of your income tax liability careful consideration has been given to the report of examination dated December 20, 1950, to your protest dated February 23, 1951, and to the statements made at the conference held.

A copy of this letter and statement has been mailed to your representative, Mr. Gilbert G. Platt, 719 North Main Street, Santa Ana, California, in accordance with the authorization contained in the power of attorney executed by you.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return (loss).....			\$(3,870.35)
Additional income and unallowable deductions:			
(a) Partnership income increased		7,803.77	
(b) Medical expense deduction decreased.....		213.86	
		<hr/>	
Total			\$4,147.28
Additional deductions:			
(c) Capital loss from sale of partnership interest allowed		\$1,689.20	
(d) Contributions allowed	702.34		2,391.54
		<hr/>	<hr/>
Net income adjusted			\$1,755.74

EXPLANATION OF ADJUSTMENTS

(a) In your income tax return for the year 1947 you reported loss in the amount of \$7,803.77 resulting from the sale of your interest in the partnership, Boreva Sportswear Co., as an ordinary loss deductible in full from your share of the distributable net income of that partnership for its fiscal year ended January 31, 1947. It is determined that this loss from the sale of your partnership interest constituted a capital loss.

Therefore, your partnership income is increased in the amount of \$7,803.77, and appropriate adjustment is made in item (c) for allowance of the loss as a capital loss.

(b) You claimed a deduction for medical expenses in the amount of \$447.97 which is allowable to the extent of \$234.11 (5% of \$4,682.28, your adjusted gross income determined). The balance of \$213.86 represents an unallowable deduction. Section 23(x), I.R.C.

(c) You are allowed a capital loss of \$7,803.77, as explained in adjustment (a) above, 50 per cent of which, or \$3,901.89, is taken into consideration as a long-term capital loss. The adjustment to your income is computed as follows:

20 *Harold Wener and Molly Wener vs.*

Net gain from the sale or exchange of capital assets as reported in your return	\$ 689.20
Long-term capital loss from sale of partnership interest allowed	3,901.89
	<hr/>
Net capital loss determined	\$ 3,212.69
Net capital loss deductible in your 1947 return limited under section 117(d) (2), I.R.C.	\$ 1,000.00*
Net capital gain reported	689.20
	<hr/>
Adjustment	\$ 1,689.20

* The balance represents a capital loss carry-over under section 117(e), I.R.C.

(d) In your return you show total contributions of \$2,026.95 but claimed none as a deduction since your return reflected no adjusted gross income. Since it has been determined that you had adjusted gross income of \$4,682.28, you are allowed a deduction for contributions of \$702.34 (15 per cent of \$4,682.28). Section 23(o), I.R.C.

COMPUTATION OF TAX

Net income adjusted	\$1,755.74
Less: Exemption	500.00
	<hr/>
Balance, subject to surtax and normal tax.....	\$1,255.74
Tentative surtax	\$ 213.48
Tentative normal tax at 3%.....	37.67
	<hr/>
Total tentative tax	\$ 251.15
Less 5%	12.56
	<hr/>
Correct income tax liability	\$ 238.59
Income tax liability shown on return, account No. 85708145	None
	<hr/>
Deficiency of income tax	\$ 238.59

[Endorsed]: T.C.U.S. Filed March 19, 1952.

[Title of Tax Court and Cause No. 39560.]

ANSWER

The Commissioner of Internal Revenue, by his attorney, Mason B. Leming, Acting Chief Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. (a) to (d) inclusive. Denies the allegations of error contained in subparagraphs (a) to (d) inclusive, of paragraph 4 of the petition.

5. Denies the allegations contained in paragraph 5 of the petition, and all unnumbered subparagraphs thereof.

6. Denies each and every allegation contained in the petition not hereinbefore specifically admitted, qualified or denied.

Wherefore, it is prayed that the determination of the Commissioner be approved.

/s/ MASON B. LEMING REM

Acting Chief Counsel, Bureau of
Internal Revenue

Of Counsel:

B. H. Neblett, District Counsel.

R. E. Maiden, Jr., Clayton J. Burrell, Special
Attorneys, Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed April 30, 1952.

EXHIBIT No. 3

[Attached to Stipulation of Facts]

DISSOLUTION AGREEMENT OF LIMITED
PARTNERSHIP OF BOREVA SPORTS-
WEAR CO.

This Agreement, dated as of July 31, 1946 but actually made and entered into this 6th day of September, 1946, by and between Leon A. Smoler, Allan A. Joseph, Harold Wener, Dorothy Jane Smoler, Margaret M. Joseph and Molly Wener,

Witnesseth: That

Whereas, the parties hereto did heretofore enter into that certain Limited Partnership Agreement of Boreva Sportswear Co., dated September 7, 1943 wherein the said Leon A. Smoler, Allan A. Joseph and Harold Wener are general partners and the said Dorothy Jane Smoler, Margaret M. Joseph and Molly Wener are limited partners, which said agreement has been modified by supplemental agreements entered into between said parties dated February 1, 1944, February 1, 1945 and December 10, 1945 respectively and which agreement as modified by said supplements is now in full force and effect; and

Whereas, the general partner, Harold Wener, has delivered to the remaining general partners, Leon A. Smoler and Allan A. Joseph a written notice of intention to retire from said partnership pursuant to the provisions of paragraph 16 of the partnership agreement as modified in the supplement dated December 10, 1945, which said notice states the said

Harold Wener's intention to retire on January 31, 1947, receipt whereof is hereby acknowledged; and

Whereas, the parties hereto desire to provide presently for the orderly withdrawal of the said Harold Wener's interest in the business, together with the interest of the limited partner, Molly Wener:

Now, Therefore, in consideration of the premises, the parties hereto do hereby mutually covenant and agree:

1. That the general partner, Harold Wener, and the limited partner, Molly Wener, shall retire and withdraw from the partnership agreement and the business as of January 31, 1947.

2. That the surviving partners, Leon A. Smoler, Allan A. Joseph, Dorothy Jane Smoler and Margaret M. Joseph, shall continue the business and shall exercise and do hereby exercise the option provided for in paragraph 16 of the supplement of December 10, 1945 to acquire the interests of Harold Wener and Molly Wener on the terms and conditions hereinafter stated in lieu of the terms stated in said paragraph and other paragraphs of the partnership agreement and its supplements.

3. The total sum to be paid to Harold Wener for his interest in the partnership shall be equal to the book value thereof as of the severance date, January 31, 1947, to be ascertained by an accounting taken as of the close of business, computed according to the Company's customary accounting

procedure, it being agreed in such event that the value of the goodwill or of the firm name shall not be included as an asset for such purpose, plus the sum of \$13,768.50.

4. The total sum to be paid to Molly Wener for her interest in the partnership shall be equal to the book value thereof as of January 31, 1947, to be ascertained by the same accounting provided for in the preceding paragraph hereof.

5. The purchase price for the interest of Harold Wener and Molly Wener, to be determined as aforesaid, shall be payable as follows: Fifty per cent (50%) of the purchase price as so determined minus fifty per cent (50%) of the amount of all withdrawals made by them after August 31, 1946, on or before thirty days from and after January 31, 1947; forty (40%) per cent of the balance of the purchase price on or before January 31, 1948; thirty percent (30%) of such balance on or before April 15, 1948; and the remaining thirty per cent (30%) of such balance on or before April 15, 1950; together with interest on the balance of such purchase price remaining from time to time unpaid (other than the initial payment due on or before thirty (30) days from and after January 31, 1947) at the rate of four per cent (4%) per annum from January 31, 1947 until paid, such interest to be payable concurrently with said deferred payments. Said amounts shall be payable to Harold Wener and Molly Wener respectively, in the proportions that the respective purchase price of each of their said shares bears to the total purchase price. In the

event that any of said payments are not made on their due dates as aforesaid, all subsequent payments, thirty (30) days after written notice to one or both of the surviving general partners shall become due and payable at the option of the retiring partners, Harold Wener and Molly Wener.

6. For all purposes hereof, it is agreed that there shall be an accounting taken as of the close of business on January 31, 1947 to be computed according to the Company's customary accounting procedure as determined by Sidney Bernstein, Certified Public Accountant. For the purpose of such accounting, it is agreed that the value of the goodwill or of the firm name shall not be included as an asset and it is agreed that in case of any dispute as to valuations of properties or assets of the firm or as to accounting procedures to be used in determining the value of the interests of said Harold Wener and Molly Wener, the said Sidney Bernstein is hereby designated the sole arbitrator to decide such questions and his decision shall be binding upon all parties hereto.

7. General partner Harold Wener covenants and agrees that he will not, either solely, or jointly with, or as agent for any person or persons, association or associations, or corporation or corporations, directly or indirectly, carry on the business of manufacturing women's sportswear and/or any other goods, chattels and merchandise competing with articles then manufactured by the partnership for the period of five (5) years from and after the severance date, at any place or places within a

radius of fifty (50) miles from any manufacturing plant in which the partnership may be carrying on its business or any part thereof, or in which goods, chattels and merchandise may be manufactured for the partnership under any contractual relationship or otherwise.

8. The partnership agrees prior to the time of dissolution to pay to the firm of Glick and Kayner, legal fees in the sum of \$5,000.00 for services rendered in this matter.

9. The covenants and agreements herein contained shall be binding upon and shall inure to the benefit of the respective parties, their heirs, testamentary beneficiaries, personal representatives and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written, in six counterparts.

.....(Seal)
.....(Seal)
.....(Seal)
.....(Seal)
.....(Seal)
.....(Seal)

State of Illinois,
County of Cook—ss.

I, Rose S. Fenning, a Notary Public in and for said County in the State aforesaid do hereby certify that Allan A. Joseph and Margaret N. Joseph, his wife, personally known to me to be the same persons whose names are subscribed on the foregoing in-

strument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 1st day of May, A.D., 1947.

[Seal] /s/ ROSE S. FENNING,
Notary Public

EXHIBIT No. 5

[Attached to Stipulation of Facts]

BILL OF SALE

This Indenture, made this 1st day of February, 1947 by and between Leon A. Smoler, Allan A. Joseph, Harry Wener, Dorothy Jane Smoler, Margaret N. Joseph and Molly Wener, as copartners doing business under the name and style of Boreva Sportswear Co., a limited partnership (hereinafter referred to as Transferors), and Leon A. Smoler, Allan A. Joseph, Dorothy Jane Smoler and Margaret N. Joseph, individually (hereinafter referred to as Transferees),

Witnesseth: That

Whereas, the said Transferors have heretofore been conducting business as copartners under the name and style of Boreva Sportswear Co. under a limited partnership agreement dated September

7, 1943 as modified by supplemental agreements entered into between said parties and dated February 1, 1944, February 1, 1945 and December 10, 1945 respectively, and have heretofore agreed to dissolve said limited partnership and distribute its assets as of the close of business January 31, 1947 pursuant to the provisions of a dissolution agreement dated as of July 31, 1946, but actually made and entered into between the parties hereto on September 6, 1946; and

Whereas, said copartners have been conducting the business of manufacturing, buying, selling and trading in women's sportswear and other merchandise; and

Whereas, by this Indenture the Transferors intend to assign, transfer, convey and vest in the said Transferees individually the property, assets and rights of the Transferors in said limited partnership;

Now, Therefore, in consideration of the premises and other valuable considerations to them delivered by the Transferees, receipt whereof is hereby acknowledged, and in further consideration of the covenants and undertakings of the Transferees hereinafter expressed, the Transferors have assigned, transferred, set over, conveyed to and vested in, and by these presents do assign, transfer, set over, convey to and vest in the Transferees, subject to the debts, liabilities, contracts, commitments, engagements and obligations of the Transferors as copartners of the firm conducting business under the name and style of Boreva Sportswear Co., a limited partnership, as shown on the books of said limited

partnership as of the close of business on January 31, 1947, all the property, assets and rights of the Transferors and all of their right, title and interest therein, in and to said partnership including, but not by way of limitation, the following:

Cash on hand; the entire stock and inventory of all kinds on hand, including but not limited to raw materials, work in process, and completed items; all machinery, tools, equipment, fixtures, furniture, supplies and sundries; all insurance of every kind and character; all right, title and interest in and to any trademarks, trade names, brands, labels, patents and patent rights; all accounts receivable, choses in action, assets and effects of every kind and description, including orders on hand, the business and goodwill and exclusive right to the fullest extent presently possessed by the Transferors to the use of the name "Boreva Sportswear Co."; each of said Transferees to have a joint interest in all of said property, assets and rights in accordance with their respective interests therein as determined by all of the applicable provisions of their partnership agreement dated September 7, 1943 as modified by supplemental agreements dated February 1, 1944, February 1, 1945 and December 10, 1945 respectively, and dissolution agreement dated as of July 31, 1946 aforesaid;

To Have And To Hold the property, assets and rights hereby assigned, transferred, set over and conveyed to and vested in the Transferees, their heirs, executors, administrators and assigns.

Nothing herein contained shall constitute a con-

veyance or transfer of any of the assets of the Transferors other than those assets constituting the respective interests of the Transferors in and to said partnership, and the property, assets and rights assigned, transferred and conveyed by the Transferors contemporaneously herewith and referred to collectively as "the properties presently conveyed."

Section 1. The Transferors, for themselves, their heirs, executors, administrators and assigns, hereby covenant and agree that:

(a) Forthwith upon the acquisition thereof the Transferors will assign, transfer and convey, or cause to be assigned, transferred and conveyed to the Transferees, by good and sufficient instruments, any property or assets acquired subsequent to the date of this Indenture in their capacity as copartners in the firm of Boreva Sportswear Co.;

(b) At any time and from time to time forthwith upon the written request of the Transferees, the Transferors will do, execute, acknowledge and deliver, or will cause to be done, executed, acknowledged and delivered, all and every such further acts, deeds, assignments, transfers, conveyances, powers of attorney and assurances as may be required for the better assigning, transferring, setting over, conveying, assuring and confirming unto and vesting in the Transferees, their successors and assigns, or for aiding and assisting in collecting or reducing to possession any or all of the properties presently conveyed and any and all of the property, assets, and rights transferred or conveyed by

virtue of any instrument or act executed or done respectively in pursuance of this Indenture;

(c) If the action of any other party is required to effect the assignment and transfer to the Transferees of any of the properties presently conveyed, the Transferors will use their best efforts to cause such action to be taken.

Section 2. The Transferors hereby constitute and appoint the Transferees, their successors and assigns, the true and lawful attorney and attorneys of the Transferors, with full power of substitution, in the name and stead of the Transferors, but on behalf and for the benefit of the Transferees, their successors and assigns, to demand and receive any and all of the above mentioned property, assets and rights, and to give receipts and releases for and in respect of the same, and any part thereof, and from time to time to institute and prosecute in the name of the Transferors, or otherwise, at the expense and for the benefit of the Transferees, their successors and assigns, any and all proceedings at law, in equity or otherwise, which the Transferees, their successors or assigns, may deem proper in order to collect or reduce to possession any of the above mentioned property, assets and rights or to enforce any claim or right of any kind in respect thereof, and to do all acts and things in relation to the above mentioned property, assets, claims and rights which the Transferees, their successors or assigns shall deem desirable, the Transferors hereby declaring that the foregoing powers are coupled with an interest and are not revocable and shall not be revoked by the Trans-

ferors, or in any other manner or for any reason whatsoever.

Section 3. The Transferors authorize the Transferees, their successors and assigns, to receive and open all mail, telegrams and other communications, and all express and other packages, addressed to the Transferors, and to retain the same in so far as they relate to any of the properties presently conveyed. The foregoing shall constitute full authorization to the postal authorities, all telegraph and express companies and all other persons to make delivery of such items to the Transferees, their successors and assigns.

Section 4. The Transferees, for themselves, their successors and assigns, agree to assume and hereby do assume all the debts, liabilities, contracts, commitments, engagements and obligations, absolute or contingent, of the Transferors as copartners of the firm doing business under the name and style of Boreva Sportswear Co., incurred by said copartners in the ordinary course of business, existing at the date hereof or which may hereafter come into existence, and shown on the books of the Transferors as such copartners as of the close of business on January 31, 1947, and agree to exonerate, indemnify and hold harmless the Transferors, their heirs, administrators, successors and assigns, from and against all suits, proceedings, claims, demands and judgments (and all loss, cost, damage or expense incident thereto) in respect of any such debts, liabilities, contracts, commitments, engagements and obligations so incurred. Nothing herein contained

shall be deemed to obligate the Transferees to assume any obligation of the Transferors incurred by any of the Transferors in connection with that certain indemnity agreement dated as of July 31, 1946, but actually made and entered into September 6, 1946, by and between the parties hereto or otherwise incurred in their individual capacities.

Section 5. This Indenture shall be binding upon and shall inure to the benefit of the respective heirs, administrators, successors and assigns of the parties hereto.

In Witness Whereof, the parties hereto have each of them hereunto set their hands and seals, all as of the day and year first above written.

[Seal] /s/ LEON A. SMOLER
[Seal] /s/ ALLAN A. JOSEPH
[Seal] /s/ HARRY WENER
[Seal] /s/ DOROTHY JANE SMOLER
[Seal] /s/ MARGARET M. JOSEPH
[Seal] /s/ MOLLY WENER

Transferors

[Seal] /s/ LEON A. SMOLER
[Seal] /s/ ALLAN A. JOSEPH
[Seal] /s/ DOROTHY JANE SMOLER
[Seal] /s/ MARGARET JOSEPH

Transferees

State of California,
County of Orange—ss.

I, Samuel Hurwitz, a Notary Public in and for said County in the State aforesaid do hereby certify

State of Illinois,
County of Cook—ss.

I, Rose S. Fenning, a Notary Public in and for said County in the State aforesaid do hereby certify that Allan A. Joseph and Margaret N. Joseph, his wife, personally known to me to be the same persons whose names are subscribed on the foregoing instrument, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 1st day of May A.D., 1947.

[Seal] /s/ ROSE S. FENNING,
Notary Public

EXHIBIT No. 6

[Attached to Stipulation of Facts]

MUTUAL RELEASE

This Mutual Release made and entered into this 25th day of August, 1947, by and between Harold Wener and Molly Wener, hereinafter referred to as first parties, and Leon A. Smoler, Dorothy J. Smoler, Allan A. Joseph and Margaret M. Joseph, hereinafter referred to as second parties,

Witnesseth:

Whereas, the parties hereto did heretofore enter into certain agreements in writing dated September

6, 1946, one being a dissolution agreement of the limited partnership of Boreva Sportswear Company, wherein and whereby said limited partnership was terminated as of January 31, 1947, Harold Wener and Molly Wener retired and withdrew from said partnership agreement, and the business as of January 31, 1947, and the price to be paid for their respective interests was fixed and determined, and the other being an indemnity agreement wherein and whereby the said first parties agreed to and did thereby indemnify the second parties against certain contingent liabilities therein more particularly described; and

Whereas, under the provisions of said dissolution agreement the amounts to be paid to parties of the first part were provided to be paid in installments, of which three (3) installments remain and are due respectively with interest as therein provided on or before January 31, 1948, on or before April 15, 1948 and on or before April 15, 1950, aggregating the sum of Fifty-Eight Thousand Two Hundred Sixty Dollars and Thirteen Cents (\$58,260.13); and parties of the first part have requested parties of the second part and do hereby request them to anticipate said future due payments to the extent of Thirty-Five Thousand Dollars (\$35,000.00) and have offered to and do hereby agree to forgive and cancel the balance of said obligation of parties of the second part in consideration of an exchange of mutual releases;

Now, Therefore, in consideration of the sum of

Thirty-Five Thousand Dollars (\$35,000.00) in hand paid by parties of the second part to or for the use and benefit of parties of the first part, receipt whereof is hereby acknowledged, it is mutually covenanted and agreed:

1. Parties of the first part have remised, released and discharged and by these presents do for themselves, their heirs, executors, administrators and assigns, remise, release and forever discharge said parties of the second part, their heirs, executors and administrators of and from all claims, demands, obligations, liabilities and causes of action contained in or arising out of or in any way connected with said dissolution agreement of limited partnership of Boreva Sportswear Company and said indemnity agreement, both dated September 6, 1946, and of and from all manner of actions, cause and causes of action, suits, debts, dues, sums of money, accounts, covenants, contracts, controversies, agreements, promises, damages, claims and demands whatsoever in law or in equity which parties of the first part now have against parties of the second part or ever had or which their heirs, executors or administrators hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of time to the day of the date of these presents.

2. Parties of the second part have remised, released and discharged and by these presents do for themselves, their heirs, executors, administrators and assigns, remove, release and forever discharge

said parties of the first part, their heirs, executors and administrators of and from all claims, demands, obligations, liabilities and causes of action contained in or arising out of or in any way connected with said dissolution agreement of limited partnership of Boreva Sportswear Company and said indemnity agreement, both dated September 6, 1946, and of and from all manner of actions, cause and causes of action, suits, debts, dues, sums of money, accounts, covenants, contracts, controversies, agreements, promises, damages, claims and demands whatsoever in law or in equity which parties of the second part now have against parties of the first part or ever had or which their heirs, executors or administrators hereafter can, shall or may have for, upon or by reason of any matter, cause or thing whatsoever from the beginning of time to the day of the date of these presents.

In Witness Whereof, the parties hereto have hereunto affixed their hands and seals as of the day, month and year first above written.

[Seal] /s/ HAROLD WENER

[Seal] /s/ MOLLY WENER

First Parties

[Seal] /s/ LEON A. SMOLER

[Seal] /s/ DOROTHY J. SMOLER

[Seal] /s/ ALLAN A. JOSEPH

[Seal] /s/ MARGARET JOSEPH

Second Parties

State of California,
County of Los Angeles—ss.

I, the undersigned, a Notary Public in and for said County and State aforesaid, do hereby certify that Harold Wener and Molly Wener, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that they signed, sealed and delivered said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 29th day of August, A. D. 1947.

[Seal] /s/ C. C. FULLER,
Notary Public

State of Illinois,
County of Cook—ss.

I, the undersigned, a Notary Public in and for said County and State aforesaid, do hereby certify that Leon A. Smoler and Dorothy J. Smoler, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that they signed, sealed and delivered said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 26th day of August, A. D. 1947.

[Seal] /s/ THERESA GRAY,
Notary Public

State of Illinois,
County of Cook—ss.

I, the undersigned, a Notary Public in and for said County and State aforesaid, do hereby certify that Allan A. Joseph and Margaret M. Joseph, personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day in person and severally acknowledged that they signed, sealed and delivered said instrument as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 26th day of August, A. D. 1947.

[Seal] /s/ THERESA GRAY,
Notary Public

[Title of Tax Court and Causes No. 39559-60.]

Filed June 29, 1955

FINDINGS OF FACT AND OPINION

The petitioners, as of February 1, 1947, executed a Bill of Sale of their respective interests in a partnership, with an initial payment to be made within thirty days and the remainder to be paid in three installments, two in 1948 and one in 1950. Later in 1947, and before any of the installments had become due, they entered into negotiations with the purchasers which resulted in a complete and final closing of the transaction for a present cash payment which was less than the aggregate of the in-

stallments which would have become due and payable in the later years. Held, that the losses sustained by petitioners were capital losses within the meaning of the statute, and subject to the limitations therein provided.

Franklin K. Lane III, Esq., and Robert M. Himrod, Esq., for the petitioners.

John J. Burke, Esq., for the respondent.

The respondent determined deficiencies in income tax against the petitioners Harold Wener and Molly Wener of \$5,279.53 and \$238.59 for the taxable year 1947. The only question for determination is whether certain losses sustained by them in the taxable year were or were not capital losses within the meaning of the statute.

Findings of Fact

Some of the facts have been stipulated and are so found.

The petitioners are husband and wife, and filed individual income tax returns for the year 1947 with the collector of internal revenue for the sixth district of California.

Prior to and during 1946 the petitioners were members of a partnership doing business as the Boreva Sportswear Company in Chicago, Illinois, and Stoughton, Wisconsin, sometimes referred to hereafter as Boreva. The partners other than petitioners were Leon A. Smoler and his wife, Dorothy J. Smoler, and Allan A. Joseph and his wife, Margaret Joseph. Harold Wener, Leon A. Smoler and

Allan A. Joseph were general partners and their wives were limited partners.

In 1946, differences arose between the petitioners, on the one hand, and the four other partners, on the other. As a result of these differences, the partners, on September 6, 1946, executed an agreement, entitled Dissolution Agreement of Limited Partnership, whereunder it was agreed that the petitioners should retire and withdraw from the partnership as of January 31, 1947, and that the other partners should purchase the interests of the petitioners. The sums to be paid for the interests were to be book value as of the severance date, and were to be computed "according to the Company's customary accounting procedure, it being agreed in such event that the value of the goodwill or of the firm name shall not be included as an asset for such purpose, plus the sum of \$13,768.50." In arriving at book value, an actual inventory was to be taken at the lower of cost or market and any real estate that might be owned by the partnership was to be conformed to "the value as of the severance date."

It was provided in the above agreement that the payments for the interests of petitioners were to be made in installments. Fifty per cent of the purchase price, less fifty per cent of the withdrawals of the petitioners after August 31, 1946, was to be paid on or before thirty days from January 31, 1947; forty per cent of the balance on or before January 31, 1948; thirty per cent of such balance on or before April 15, 1948; and the remainder on or before

April 15, 1950. Interest was to run at four per cent, except as to the initial payment.

Under date of February 1, 1947, the petitioners, by a writing entitled Bill of Sale, and in consideration of the covenants and undertakings of the other four partners, assigned and conveyed to the latter their interests in Boreva as of the close of business on the preceding day.

An audit was made as theretofore specified, whereby the respective partners' interests were determined as of January 31, 1947, and as of that date, the balance in the capital account of Harold Wener was found to be \$49,924.63, and that of Molly Wener \$25,206.49. Against these balances, charges were made under an indemnity agreement theretofore made, whereby the petitioners were obligated to indemnify the other four partners against certain contingent liabilities. The aggregate of the charges was in the amount of \$1,177.58.¹ The initial payments computed under the Dissolution Agreement and made to the petitioners pursuant thereto in April of 1947, were \$10,428.28 to Harold Wener and \$5,265.13 to Molly Wener, leaving the balances due them to be paid in installments on January 31, 1948, April 15, 1948, and April 15, 1950.

Subsequent to their agreement to withdraw from

¹ The aggregate of the indemnity charges is shown in the stipulation as \$1,177.56, but a reconciliation of other figures which were likewise stipulated indicates that the amount actually charged was \$1,177.58, of which \$782.49 was charged against the capital account of Harold Wener, and \$395.09 against that of Molly Wener.

Boreva, the petitioners moved to California, where they established a sportswear manufacturing company in Westminster, California.

On or before August 25, 1947, and before any further payments were due from the sale of their interests in Boreva, petitioners entered into negotiations with the purchasers with respect to the balances which were thereafter to become due and payable. On August 25, 1947, and in consideration of immediate payment, as against later payment on the installment dates theretofore specified and agreed upon, the petitioners agreed to accept, and did accept, \$35,000 in complete satisfaction of the aggregate amounts which would have become payable to them on the installment dates, and the \$35,000 so agreed upon was currently paid to and received by them.

Harold Wener's share of the \$35,000 was \$23,257.50, as compared with \$38,713.86, which represented the aggregate of the payments which would have become due and payable to him by installments. Molly Wener's share of the \$35,000 was \$11,742.50, as compared with \$19,546.27, which would have become due and payable to her by installments.

A factor which prompted the petitioners in initiating the negotiations which resulted in the adjustment of the terms of the original sales agreement, as shown above, was that the petitioners had a present pressing need of funds for use in the business they had established in California.

The over-all result of the sale by petitioners of

their interests in Boreva, including the adjustments of both payment dates and amounts, all of which occurred in the taxable year 1947, was a loss of \$15,456.36 by Harold Wener and a loss of \$7,803.77 by Molly Wener. In their returns for 1947, the petitioners treated the said losses as ordinary losses, deductible in full.

The respondent in his determination of the deficiencies determined that the losses were capital losses under the statute, and subject to the limitations provided therein.

Opinion

Turner, Judge: It is the contention of the petitioners that they sold their interests in Boreva at February 1, 1947, at the basis therefor to them, and that the losses were sustained under the agreement of August 25, 1947, in a transaction separate and apart from the sale, and that the latter transaction was not a sale of a capital asset and the resulting loss not a capital loss, but an ordinary loss deductible in full. They cite and rely upon *Hale vs. Helvering*, 85 F.2d 819, as being controlling.

It is the position of the respondent that the various agreements, including the agreement of August 25, 1947, and the steps taken thereunder, were part and parcel of one transaction, namely, the sale by the petitioners of their partnership interests, and that the losses sustained were capital losses, as determined.

It is our opinion and we hold that the losses were sustained from the sale by petitioners of their capital interests in the partnership and that the re-

spondent did not err in his determination with respect thereto. The mere fact that there would have been no losses if the terms of the sale as originally agreed upon had remained unchanged and the payments pursuant thereto had been made does not on the facts indicate or require the conclusion that the losses were sustained in a transaction separate and apart from the sale. After the initial payments, but later in the same year and before any of the installments had become due and payable, the petitioners, for reasons which were solely their own, saw fit to renegotiate the unexecuted portions of the sales agreement, namely, the deferred payment provisions, to the end that for a present cash payment in lieu of later payments in installments, as theretofore provided, the petitioners agreed upon and accepted reduced prices for their interests in Boreva. These renegotiated provisions superceded the provisions which had originally prescribed the terms, dates and amounts of payment, and the transaction was closed pursuant thereto. See *Borin Corporation*, 39 B.T.A. 712, *affd.* 117 F.2d 917; *Pinkney Packing Co.*, 42 B.T.A. 823; and *Des Moines Improvement Co.*, 7 B.T.A. 279. See also *Hirsch vs. Commissioner*, 115 F.2d 656, reversing 41 B.T.A. 890, which reversal was followed in *A. L. Killian Co.*, 44 B.T.A. 169, which in turn was affirmed at 128 F.2d 433.

Hale vs. Helvering, on which the petitioners most strongly rely, is not this case. There the transaction was the compromise settlement of a past due obligation, and the question was whether there had

been a sale of the obligation. In the instant case, and prior to the dates the remainder of the purchase price was to become due, there was a re-negotiation, adjustment, or revamping of the sale itself both as to price and the terms of payment. We accordingly do not reach the question considered and decided in the Hale case. *L. D. Coddon & Bros. Inc.*, 37 B.T.A. 393, also cited and relied on by the petitioners, is likewise distinguishable. The distinction made in that case of *Des Moines Improvement Co.*, *supra*, applies with equal force to the instant case. Furthermore, as already pointed out, there was in fact in the instant case a re-negotiation and revision of the unexecuted provisions of the sales contract itself and the substitution of new provisions therefor.

In passing, attention is called to the decision of the Supreme Court in *Arrowsmith vs. Commissioner*, 344 U.S. 6. In that case, the original transaction had been regarded as finally closed some four years prior to the taxable year. But, due to judgments subsequently obtained by third parties, payments were required of the taxpayers, resulting in losses to them. It was the opinion of the Supreme Court that character of the losses which so resulted as capital losses or ordinary losses was to be determined by reference to the original transaction. The original transaction having been a capital gain or loss transaction, the losses actually incurred in years after the transaction was regarded as closed were held to be capital losses.

Decisions will be entered under Rule 50.

Served June 29, 1955.

The Tax Court of the United States
Washington

Docket No. 39559

HAROLD WENER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court filed June 29, 1955, the parties on August 30, 1955, having filed an agreed computation of the tax involved, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1947 in the amount of \$5,279.53.

[Seal]

/s/ BOLON B. TURNER,
Judge

Entered September 2, 1955.

The Tax Court of the United States
Washington

Docket No. 39560

MOLLY WENER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Findings of Fact and Opinion of the Court filed June 29, 1955, the parties on August 30, 1955, having filed an agreed computation of the tax involved, it is

Ordered and Decided: That there is a deficiency in income tax for the year 1947 in the amount of \$238.59.

/s/ BOLON B. TURNER,
Judge

Entered: September 2, 1955.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Tax Cause No. 39559.]

PETITION FOR REVIEW

Comes now Harold Wener, through his attorneys, Robinson and Powers by Franklin K. Lane III, and petitions the United States Court of Appeals

for the Ninth Circuit to review the decision of the Tax Court of the United States, rendered in the above cause on September 2, 1955 (Docket No. 39559), and deciding that there is a deficiency in the income tax of your petitioner in the amount of \$5,279.53 for the calendar year 1947.

Petitioner filed his individual income tax return for the calendar year 1947 with the Collector of Internal Revenue for the Sixth District at Los Angeles, California, which District is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The controversy involves the proper determination of the petitioner's liability for federal income taxes for the calendar year 1947. The petitioner sold his interest in a partnership in February, 1947, for a certain sum which was to be paid in installments over a period of years by the remaining partners. About seven months later, in the same calendar year, your petitioner discounted the balance remaining on the purchase price and accepted a lesser sum in cash in full settlement of the balance owed by the purchasers of the partnership interest. The petitioner reported as an ordinary loss for the calendar year 1947 the difference between the cash amount accepted by him in full settlement and the balance due on the purchase price under the installment obligation.

The Commissioner of Internal Revenue held that the loss sustained by the petitioner on the discount of the balance remaining on the purchase price was a capital loss arising out of the sale of the partner-

ship interest, which position was sustained by the Tax Court of the United States in its decision referred to above.

The petitioner, being aggrieved by the findings of fact and conclusions of law contained in the findings and opinion of the Tax Court in this cause and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ FRANKLIN K. LANE III.

Of Robinson and Powers, Counsel
for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed December 2, 1955.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Tax Court Cause No. 39560.]

PETITION FOR REVIEW

Comes now Molly Wener, through her attorneys, Robinson and Powers by Franklin K. Lane III, and petitions the United States Circuit Court of Appeals for the Ninth Circuit to review the decision of the Tax Court of the United States, rendered in the above cause on September 2, 1955 (Docket No. 39560) ordering and deciding that there is a deficiency in the income tax of your petitioner in the amount of \$238.59 for the calendar year 1947.

Petitioner filed her individual income tax return for the calendar year 1947 with the Collector of Internal Revenue for the Sixth District at Los Angeles, California, which District is located within the jurisdiction of the United States Court of Appeals for the Ninth Circuit.

The controversy involves the proper determination of the petitioner's liability for federal income taxes for the calendar year 1947. The petitioner sold her interest in a partnership in February, 1947, for a certain sum which was to be paid in installments over a period of years by the remaining partners. About seven months later, in the same calendar year, your petitioner discounted the balance remaining on the purchase price and accepted a lesser sum in cash in full settlement of the balance owed by the purchasers of the partnership interest. The petitioner reported as an ordinary loss for the calendar year 1947 the difference between the cash amount paid in settlement and the balance due on the purchase price under the installment obligation.

The Commissioner of Internal Revenue held that the loss sustained by the petitioner as a result of the discount of the balance remaining on the purchase price was a capital loss arising out of the sale of the partnership interest, which position was sustained by the Tax Court of the United States in its decision referred to above.

The petitioner, being aggrieved by the findings of fact and conclusions of law contained in the findings and opinion of the Tax Court in this cause

and by its decision entered pursuant thereto, desires to obtain a review thereof by the United States Court of Appeals for the Ninth Circuit.

/s/ FRANKLIN K. LANE III.

Of Robinson and Powers, Counsel
for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed December 2, 1955.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Tax Court Cause Nos. 39559-60.]

STATEMENT OF ORAL TESTIMONY OF
HAROLD WENER

Contained on pages 13 through 28 of the official transcript of the hearing in the above matter held at Los Angeles, California, on February 27, 1953.

Mr. Wener testified that in 1946 he was engaged in the business of manufacturing and selling ladies sportswear clothes under a partnership which was composed of he and his wife and two other married couples. The six partners had been in the same business for several years prior to that time.

They had a manufacturing plant in Wisconsin and a sales office in Chicago. Mr. Wener was the designer and production manager.

In 1946 a disagreement arose between Mr. Wener and his other partners, particularly his copartner,

Leon Smoler, as a result of which he decided to withdraw from the partnership.

On September 6, 1946 he entered into a Dissolution Agreement with the other four partners under the terms of which the four remaining partners were to purchase the partnership interests of Mr. Wener and his wife at the book value as of January 31, 1947.

He ceased any active participation in the partnership in September of 1946. Then, on January 31, 1947, the partnership was dissolved and Mr. Wener and his wife executed a Bill of Sale transferring their partnership interests to the remaining partners in consideration for the payment of a sum of approximately \$75,131.12, to be paid in installments over a period of about three years with the first payment due in January, 1947.

The first installment made was actually made in April, 1947 amounting to approximately \$15,000.00.

Mr. Wener then came to Westminster, California, where he constructed a sportswear manufacturing plant with money invested by both himself and his wife.

During their first year of operation they had a loss and were in need of additional working capital and cash. He borrowed \$20,000.00 from the Bank of America giving as collateral the indebtedness due him by the remaining partners in Chicago, as represented by a written contract.

Mr. Wener identified a letter dated August 14, 1947 from H. N. Warren, Assistant Manager of the Bank of America, which was introduced as Peti-

tioners' Exhibit No. 8. This letter was written at the request of Mr. Wener.

Having attempted to raise additional cash in many ways, Mr. Wener then contacted his former partners in an attempt to persuade them to make a lump sum payment in full settlement of the balance on the purchase price due to Mr. Wener. The first settlement offer from Mr. Wener was rejected by the former partners, who in turn made a counter-offer of settlement of \$35,000.00, which was almost \$24,000.00 less than what they were obligated to pay Mr. Wener.

Mr. Wener agreed to accept their offer of \$35,000.00 in full settlement of the balance of the purchase price, which sum was paid to Mr. Wener about August 29, 1947. From this \$35,000.00 he paid \$10,000.00 to the Bank of America, which represented the balance due on the loan of \$20,000.00.

Mr. Wener identified certified copies of the bank statements of the Westminster Sportswear Co. for the month of August 1947, which were introduced in evidence as Exhibit No. 9. Mr. Wener identified a deposit entry on the bank statement dated August 29, 1947 in the amount of \$25,444.06 as representing the balance of the \$35,000.00 he received from his former partners. He further testified that this amount was used in his business.

Affidavit of Service by Mail attached.

[Endorsed]: T.C.U.S. Filed January 23, 1956.

[Endorsed]: Filed Mar. 1, 1956. Paul P. O'Brien, Clerk.

In the United States Court of Appeals
for the Ninth Circuit

[Title of Tax Court Causes Nos. 39559-60.]

STATEMENT OF POINTS ON APPEAL

Now comes Harold Wener and Molly Wener, the appellants in the above entitled actions, through their attorney, Franklin K. Lane III, and hereby assert the following errors which it intends to urge on review by the United States Court of Appeals for the Ninth Circuit, of the decisions of the Tax Court of the United States rendered in the above entitled actions on December 2, 1955:

1. The Tax Court erred in finding that the losses sustained by the appellants were from the sale of their partnership interests and therefore resulted in capital losses rather than ordinary losses arising from the cancellation of indebtedness, or losses incurred in business.

2. The Tax Court erred in failing to find that the acceptance of an immediate lesser sum by the appellants in cash in lieu of installment payments over a period of years resulted in an ordinary loss to the appellants.

3. The Tax Court erred in finding that the settlement or a compromise agreement entered into in August 1947 between appellants and their former partners was a renegotiation or revision of the original contract under which they sold their partnership interests.

4. The Tax Court erred in failing to find that

the settlement or compromise agreement of August 1947 between appellants and their former partners was in fact a discount of an obligation to pay money, which transaction was separate and apart from the sale by the appellants their partnership interests.

5. The Tax Court erred in entering its decision, wherein it ordered and decided that there is a deficiency in income tax against the appellant Harold Wener in the amount of \$5,279.53 and against the appellant, Molly Wener, in the amount of \$238.59 for the calendar year 1947.

/s/ FRANKLIN K. LANE III.

Attorney for Appellants

[Endorsed]: T.C.U.S. Filed January 23, 1956.

The Tax Court of the United States
Washington

[Title of Causes Nos. 39559-60.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 18, inclusive, constitute and are all of the original papers and proceedings on file in my office as called for by the "Designation of Contents of Record on Review", "Designation of Additional Portions of Record" and "Supplemental Designation of Additional Portions of Record," including Exhibits 1 through 6 attached to the Stipulation of Facts and Petitioners' Exhibits 7, 8

